Supreme Court, U.S.
FILED
NOV 23 1988
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CLERK

No. 88-514

# In the Supreme Court of the United States

OCTOBER TERM, 1988

J. CLENTON HENSON AND SHEILA HENSON LUTZ,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the warrant that authorized the search of petitioners' business office was sufficiently particular under the Fourth Amendment.

2. Whether petitioner Henson was properly convicted under 15 U.S.C. (& Supp. IV) 1990c(a) for causing the transferors of motor vehicles to give false statements to the transferees concerning the cumulative mileage registered on the vehicles' odometers.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 848 F.2d 1374.

### JURISDICTION

The judgment of the court of appeals was entered on June 15, 1988, and a petition for rehearing was denied on July 28, 1988 (Pet. App. 31a). The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners J. Clenton Henson and Sheila Lutz were convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. Petitioner Henson was also convicted on six

counts of causing a transferor of an automobile to give a false odometer statement to a transferee, in violation of 15 U.S.C. 1990c(a).[1] Henson was sentenced on the conspiracy count to a four-year term of imprisonment and a fine of $120,000. He was also sentenced to one-year terms of imprisonment on the Section 1990c(a) violations, which were made to run concurrently with each other and with his sentence on the conspiracy count. Lutz was sentenced to a one-year term of imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. 1a-23a).

1. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. 2a-6a). It showed that petitioners were involved in an extensive odometer-tampering scheme. Petitioner Henson and others would purchase large numbers of late-model, high-mileage automobiles and resell them to local dealers for resale to the public. For a fee of $50 or $100, Henson would provide the dealers with an odometer statement that understated the automobiles' true mileage. Henson would also use a variety of methods to conceal the odometer scheme, including altering or fabricating the original title certificates. To accomplish that, petitioner Lutz and others would forge dealers' names on bills of sale, odometer statements, automobile titles, and registration forms. Pet. App. 2a-5a.

During their investigation of the odometer scheme, federal and state law enforcement officials executed a search warrant at petitioners' business premises in Benton, Kentucky (Pet. App. 6a). In an affidavit submitted in support of the application for the warrant, a postal inspector

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[1] Henson was acquitted on four counts of mail fraud under 18 U.S.C. 1341. The government dismissed a fifth mail fraud count during trial. Henson was also acquitted on four other counts charging violations of 15 U.S.C. 1990c(a). Lutz was acquitted on five counts of mail fraud.

described the 15-month investigation culminating in the request for the warrant. The inspector explained, in particular, that he had personally investigated 76 automobiles that petitioners had purchased in California from June through December 1983. For each of those cars, the inspector reviewed the titles and auction invoices obtained from the California auctioneers and compared them with the corresponding Kentucky registrations, title applications, inspection forms, and odometer statements. In each case, the inspector stated, the mileage listed in the Kentucky documents was significantly lower than the mileage stated in the California documents. *Id.* at 10a-11a. The affidavit for the warrant also recounted the inspector's conversations with two automobile dealers, who reported that petitioners had routinely offered them false odometer statements in return for a set fee (*id.* at 11a-12a). On the basis of those allegations, the magistrate issued a warrant to search petitioners' business premises for "any and all records" including, but not limited to, specific items relating to the odometer scheme.[2]

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[2] In full, the warrant authorized the police to search for (Pet. App. 15a-16a):

> any and all records, but not limited to modules, modems and connectors, computer, computer terminals, hard copy user documentation pertaining to files and/or programs, cables, printers, discs, floppy discs, tapes, vendor phone numbers, all original and backup tapes and discs, any other informational data input, all vendor manuals for hardware and software, printouts, receipt books, ledger books, ledger cards, records of sales, odometer statements, file records on individual used car dealers, file records, payment receipts, bank transaction records, invoices regarding the purchase of used vehicles, automobile auction company records and/or lists, any correspondence from auto auction companies, and any motor vehicle titles for the period from June

2. The court of appeals affirmed (Pet. App. 1a-23a). The court rejected the contention (*id.* at 15a-17a) that the search warrant was insufficiently particular. It noted that the inspector's affidavit "suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers," and the court had "no hesitation" concluding that "there was probable cause to support a search of this breadth" (*id.* at 17a). In short, the court found (*ibid.* (citation omitted)), "the warrant in this case was as 'specific as the nature of the activity under investigation permitted.' " The court also rejected (*id.* at 18a-21a) petitioner Henson's contention that he was improperly convicted under 15 U.S.C. (& Supp. IV) 1990c(a) because he was not a "transferor" of an automobile. The court explained that even if Henson was not himself a "transferor," he was nevertheless within the ambit of Section 1990c(a) because he had *caused* a transferor to make a false statement concerning the mileage of the automobiles (Pet. App. 19a-20a).[3]

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1983 through the present, including but not limited to the following individuals and companies:

> Clinton [*sic*] Henson, Henson Motor Company, Sheila Henson Lutz, Allen [*sic*] Henson, Ronnie Walston and/or Waltson Used Cars, Charles Haley and/or Haley Used Cars, Charlie Aldridge, 79 Motors, Bob Pugh, Ralph Lutz, Shane Howard and T.S. Motors.

Also, any other used car dealers conducting business with Henson Motor Co., and/or Allen [*sic*] Henson. It is also requested that the vehicle identification number and/or tag number be recorded on any vehicles found in the parking lot surrounding the building.

[3] The court of appeals also held that the mails had been used for the purpose of executing the odometer tampering scheme; that the affidavit in support of the warrant did not contain material misrepresentations; that the information contained in the affidavit was not stale; that in executing the search, the officers did not impermissibly exceed

## ARGUMENT

1. Petitioners first contend (Pet. 9-16) that the search warrant was insufficiently particular and that the warrant should have limited the search to the files relating to the 76 automobilies that the inspector had investigated. The court of appeals correctly rejected that contention.

The Fourth Amendment particularity requirement is designed to prevent " 'general, exploratory rummaging in a person's belongings.' " *Andresen* v. *Maryland,* 427 U.S. 463, 480 (1976) (quoting *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971)). But where the underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. For example, in *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980), the defendant contended that a search warrant should have been limited to currency bearing particular serial numbers, in view of the fact that the government knew before the search that currency with those serial numbers would be found in the defendant's house. Rejecting that contention, the Fifth Circuit held that because the government had established probable cause to search for more than those specific bills, the warrant was entitled to encompass all currency in the defendant's possession. 630 F.2d at 811-812.

More recently, the Eighth Circuit made the same point in *United States* v. *Kail,* 804 F.2d 441 (1986). There, the court upheld a warrant that permitted the seizure of "almost all of the [defendant's] business records." The court reasoned that "there was probable cause to believe

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the terms of the warrant; and that the district court did not improperly enhance certain of the fines under the Criminal Fine Enforcement Act, 18 U.S.C. 3623 (now repealed). Pet. App. 7a-15a, 17a-18a, 21a-23a. The petition does not present any of those issues.

that fraud permeated the entire business operation." 804 F.2d at 445.

The First Circuit took the same view in *United States* v. *Brien,* 617 F.2d 299, cert. denied, 446 U.S. 919 (1980). In that case the court of appeals approved a warrant that concededly covered most of the defendant's business records (617 F.2d at 306). The court determined that the affidavit in support of the warrant showed that the defendant's fraud was "so extensive as to justify a belief by the magistrate that all these documents were likely to constitute evidence of the crimes under investigation" (*ibid.*). Like petitioner, the defendant in *Brien* contended that the warrant should have been limited to particular customers about whom the authorities had specific information. The First Circuit rejected that claim, noting (*id.* at 307-308) that there was a sufficient basis to believe that the defendant had engaged in similar practices with his other customers. Accord *United States* v. *Sawyer,* 799 F.2d 1494, 1508 (11th Cir. 1986), cert. denied 479 U.S. 1069 (1987) (holding that evidence of pervasive fraud justified a warrant that was not limited to the 25 transactions specified in the affidavit); *United States* v. *McClintock,* 748 F.2d 1278 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985); *United States* v. *Offices Known as 50 State Distributing Co.,* 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Hillyard,* 677 F.2d 1336 (9th Cir. 1982); *National City Trading Corp.* v. *United States,* 635 F.2d 1020 (2d Cir. 1980).

Here, the warrant (Pet. App. 15a-16a) authorized the agents to seize the records found on petitioners' business premises. The court of appeals' fact-bound determination (*id.* at 17a) that there was sufficient probable cause to justify such a search is correct.[4] The affidavit did not

[4] In assessing the sufficiency of probable cause this Court has made it clear that the issuing magistrate is to "make a practical, common-

simply disclose 76 discrete instances of odometer tampering. Rather, the affidavit showed that petitioners routinely offered dealers fraudulent odometer statements. Thus, the issuing magistrate was entitled to infer that the 76 profiled cases of understated odometer readings represented merely "the tip of the iceberg" (*United States* v. *Brien*, 617 F.2d at 308).

The court of appeals' decision is not in conflict with this Court's decision in *Andresen* v. *Maryland, supra.* In that case, the Court held that a general phrase in certain warrants, authorizing the police to search for "other fruits, instrumentalities and evidence of crime" (463 U.S. at 479), must be read in context with the full text of the warrants, which authorized the search for and seizure of material relevant only to petitioner's activities in connection with a particular real estate conveyance. The Court did not hold, however, that a search warrant must be confined to a particular transaction or to a particular offense. Nothing in the *Andresen* case precludes the government from conducting an area-wide search of a business's premises where, as here, there is probable cause to believe that the entire business is permeated by fraud.

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sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). A reviewing court need only ensure that the magistrate had a "substantial basis" for finding that probable cause existed (*id.* at 238-239), bearing in mind that affidavits are to be reviewed "in a commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965)), and that the judgment of the issuing magistrate is entitled to considerable deference (*Ventresca*, 380 U.S. at 109; *United States* v. *McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986); *United States* v. *Ellison*, 793 F.2d 942, 946 (8th Cir.), cert. denied, 479 U.S. 937 (1986); *United States* v. *Lamport*, 787 F.2d 474, 476-477 (10th Cir.), cert. denied, 479 U.S. 846 (1986); *United States* v. *Travisano*, 724 F.2d 341, 345 (2d Cir. 1983)).

Petitioners' reliance (Pet. 12-13) on the Eighth Circuit's decisions in *In re Grand Jury Proceedings*, 716 F.2d 493 (1983), and *Rickert* v. *Sweeney*, 813 F.2d 907 (1987), and the First Circuit's decision in *United States* v. *Abrams*, 615 F.2d 541 (1980), is also misplaced. In those cases the courts of appeals found that the warrants exceeded the breadth of the underlying probable cause. See *In re Grand Jury Proceedings*, 716 F.2d at 498-499; *Rickert*, 813 F.2d at 909; *Abrams*, 615 F.2d at 544 & n.7.[5] The same courts have made clear, however, that "[a]ll business records may be seized * * * if probable cause exists to believe that the entire enterprise has engaged in a pervasive scheme to defraud" (*Rickert*, 813 F.2d 909; accord *United States* v. *Kail*, 804 F.2d 441, 445 (8th Cir. 1986); *United States* v. *Brien*, 617 F.2d at 306). Applying that standard in the present case, the court of appeals found that the inspector's affidavit "suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers" (Pet. App. 17a). The court therefore concluded that "there was probable cause to support a search of this breadth" (*ibid.*). That fact-bound determination warrants no further review.

2. Petitioner Henson contends (Pet. 16-19) that he was unlawfully convicted under 15 U.S.C. (& Supp. IV) 1990c(a). That statute attaches criminal liability for violations of other provisions of the statute. In this case, petitioner was charged under 15 U.S.C. 1988(b), which prohibits a "transferor" of a motor vehicle from making a

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[5] The Ninth Circuit noted a similar infirmity when it invalidated the search warrant in *United States* v. *Cardwell*, 680 F.2d 75 (1982). The court explained that, based on the underlying investigation, " 'the government knew exactly what it needed and wanted and where the records were located.' " Accordingly, the court reasoned, " '[t]here was no necessity for a massive re-examination of all records bearing on income and expenses.' " *Id.* at 78 (citation omitted).

false representation to a transferee about the mileage of the vehicle. Petitioner contends that he was not a "transferor" of automobiles and that he therefore did not fall within the reach of Section 1988(b). For that reason, he argues, the criminal sanctions of Section 1990c(a) cannot be imposed against him.

The court of appeals correctly rejected that contention. By its terms, Section 1990c(a) applies not only to persons who violate other provisions of the Act, such as Section 1988(b), but also to persons who "cause" acts to be done that violate those provisions. In this case, petitioner Henson caused others to make false statements to transferees regarding the cumulative mileage registered on odometers. That conduct constituted causing acts to be done that violated Section 1988(b), and thus was subject to the criminal sanctions of Section 1990c(a). As the court of appeals noted (Pet. App. 19a-20a, 21a), there was sufficient evidence for the jury to find that Henson "adopted a transferor's acts and capacity by causing a transferor to commit a criminal act" (*id.* at 20a).

The Ninth Circuit's decision in *United States* v. *Powell*, 806 F.2d 1421 (1986), is not to the contrary. As the court below noted (Pet. App. 20a-21a), and as petitioner acknowledges (Pet. 18 n.21), the Ninth Circuit in *Powell* agreed that it is "certainly" a "viable theory" to charge a defendant under Section 1990c(a) with having caused a transferor to make a false statement of mileage; but because the government in the *Powell* case had not raised that claim in the lower court, and because the indictment and the jury instructions had identified the defendant as a transferor, the court refused to reach the merits of the government's contention. Finally, petitioner contends (Pet. 19) that unlike Section 1988(b), which does not apply to persons who cause a false statement to be made, 15 U.S.C. 1984 expressly covers persons who "cause" an

odometer to be altered. The fact that petitioner might also have been prosecuted under that statute, however, is not a reason to ignore the plain language of Section 1990c(a). And it is under Section 1990c(a) that petitioner was convicted for causing a transferor to violate Section 1988(b).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699/60779